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Nº. 97-433

In The

Supreme Court of the United States

October Term, 1996

BONNIE LAMVERMEYER,
Petitioner,

v.

DENISON UNIVERSITY, ET AL.,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION
with Appendix

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QUESTION PRESENTED

Whether, under the Americans with Disabilities Act, an employer may discipline an individual with a disability for violating a workplace conduct standard as it would any other employee, even if the misconduct resulted from a disability.

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RESPONDENTS' BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 794(d)

(d) Standards applicable to complaints. The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210) as such sections relate to employment.

(As amended October 29, 1992 . . . .)

42 U.S.C. § 12101(b)(2)

It is the purpose of this chapter -- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

42 U.S.C. § 12112(b)(6).

[T]he term "discriminate" includes --

using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity;

STATEMENT OF THE CASE

Respondents rely upon the facts as expressed in the District Court Opinion of the Honorable John D. Holschuh for their statement of the case. At Appendix A-4 through A-16.

SUMMARY OF ARGUMENT

1. There is no explicit conflict between the United States Courts of Appeals on the question presented under the current state of the law. The Second Circuit Court of Appeals case cited by Petitioner for this premise was decided, on questionable authority, prior to subsequent revisions in applicable law, and post-amendment Second Circuit case law is ambiguous as to the issue.

2. The Americans with Disabilities Act and implementing regulations dictate a uniform rule of law recognized and followed by the decisions below.

REASONS THE PETITION SHOULD BE DENIED

A CONFLICT BETWEEN THE UNITED STATES COURTS OF APPEALS ON THE DIRECT QUESTION PRESENTED DOES NOT EXIST.

The Americans with Disabilities Act ("ADA") is a federal statute which prohibits, in relevant part, discrimination in the workplace against individuals with disabilities. 42 U.S.C. § 12101 et seq. It is derived from principles established under the earlier Rehabilitation Act of 1973, which may be considered authoritative precedent for the ADA where relevant. Recognizing that the ADA mandates equality of opportunity rather than special treatment for individuals with disabilities, federal appellate courts considering the issue have confirmed that there is a permissible distinction between taking action adverse to an employee on the basis of misconduct, as opposed to an underlying disability, even if the misconduct arguably

related to the disability in some manner. See, e.g., Palmer v. Circuit Court of Cook County, Ill, 117 F.3d 351 (7th Cir. 1997); Harris v. Polk County, Iowa, 103 F.3d 696 (8th Cir. 1996); Williams v. Widnall, 79 F.3d 1003 (10th Cir. 1996); Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995); Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995); Little v. FBI, 1 F.3d 255 (4th Cir. 1993); Taub v. Frank, 957 F.2d 8 (1st Cir. 1992).

Petitioner maintains that the uniform decisions of the United States Courts of Appeals above are in conflict with a 1991 decision by the Second Circuit Court of Appeals under § 504 of the Rehabilitation Act, Teahan v. Metro-North Commuter R. Co., 951 F.2d 511 (2d Cir. 1991). Petitioner's claim of a purported conflict is premature at best. The position of the Second Circuit under post-Teahan amendments to § 504 is unclear. Those amendments, accompanying rulemaking and guidance by the Equal

Employment Opportunity Commission ("EEOC"), and subsequent decisions both within and without that Circuit strongly suggest that any post-amendment holding under the ADA on the identical issue would agree with the uniform rule applied by the other United States Courts of Appeals which have addressed the issue.

The Second Circuit Court of Appeals decided Teahan on December 22, 1991.[1] In 1992, in order to clarify the standards governing federally funded entities, Congress amended § 504 to expressly incorporate the non-discrimination mandate and corresponding liability standards of Title I of the ADA. These amendments became effective October 29, 1992. See Rehabilitation Act Amendments of

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[1] The Second Circuit ultimately revisited the case in the appeal of the original remand. Relevant review, however, was confined to case history. Teahan v. Metro-North Commuter R. Co., 80 F.3d 50 (2d Cir. 1996).

1992, codified at 29 U.S.C. § 794(d). The Teahan court was thus interpreting a pre-amendment, pre-ADA statutory mandate, without the benefit of EEOC rulemaking and guidance on the ADA addressing the precise issue raised by Petitioner.

Teahan was decided under a statute which was subsequently amended in relevant part. Furthermore, a close review of the cases relied upon in Teahan indicates that they are in fact primarily § 501 cases applicable to federal government employees.[2] This is a distinction of significance, due to the fact that § 501 of the Rehabilitation Act imposes an affirmative action mandate upon the federal government which § 504 and the ADA do not. 29 U.S.C.

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[2] See, e.g., Nisperos v. Buck, 720 F. Supp. 1424 (N.D. Cal. 1989) (observing that applicable § 501 regulations require the federal government to be a "model employer of handicapped individuals").

§ 791(b).[3] Accordingly, the Teahan court arguably arrives at the conclusion relied upon by Petitioner in the context of heightened standards of duty which are inapplicable to either the ADA or § 504.

Finally, a more recent decision by the Second Circuit indicates that Teahan is of uncertain vitality. In Bates v. Long Island R. Co., 997 F.2d 1028 (2d Cir. 1993), a § 504 Rehabilitation Act case, one of the plaintiffs claimed that her disability prevented her from calling in and reporting pursuant to the requirements of a leave of absence policy, and that she was thus terminated solely because of her disability. The Bates court distinguished Teahan and found that the plaintiff in question was discharged solely for her

[3] Entitled "Federal agencies; affirmative action program plans."

insubordination in failing to call in rather than her handicap. Bates, 997 F.2d at 1036.[4]

In summary, Teahan should not be considered in conflict with decisions in other Circuits for three reasons. (1) Teahan was decided before statutory amendments became effective in late 1992, which made the employment provisions of Title I of the ADA applicable to such claims. (2) The cases relied upon by the Teahan court dealt with a section of the Rehabilitation Act inapposite to claims raised under Section 504. (3) A more recent Second Circuit decision has distinguished Teahan, thus suggesting that the case would not necessarily be followed should the Second Circuit ultimately visit the precise issue presented under the

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[4] Another post-amendment Second Circuit case, Sedor v. Frank, 42 F.3d 741 (2nd Cir. 1994), relies upon Teahan in a related but more ambiguous context, and does not address the issue of egregious misconduct under the ADA.

ADA. Accordingly, Teahan does not provide the basis for establishing a current conflict between the United States Courts of Appeals on the issue raised in the proceedings below.

THE ADA, IMPLEMENTING REGULATIONS, AND GUIDANCE PROVIDED BY THE EEOC CONSTITUTE DISPOSITIVE AUTHORITY ON THE QUESTION PRESENTED.

The EEOC has addressed the precise issue raised by the decision below. Specifically, in Question No. 30 of the EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act, issued on March 25, 1997, the EEOC poses and answers the following inquiry:

> May an employer discipline an individual with a disability for violating a workplace

conduct standard if the misconduct resulted from a disability?

Yes, provided that the workplace conduct standard is job-related for the position in question and is consistent with business necessity.

See EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act, ("Guidance"), No. 915.002 at Appendix A-26 through A-31. This opinion is followed by the striking example of an employee who steals money from his employer, pointing out that even if the employee asserts that the misconduct was caused by a disability, the employer may discipline the employee consistent with its uniform disciplinary policies. See id.

The EEOC based the above answer,[5] directly responsive to the question presented, on 42 U.S.C. § 12112(b)(6),[6] which proscribes the use of qualification standards and selection criteria that screen out individuals with disabilities "unless the standard . . . or other selection criteria . . . is shown to be job-related for the position in question and is consistent with business necessity . . . ." The agency's explanation accompanying its final ADA rule states "that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and non-disabled, to the same performance and conduct standards." 56 Fed. Reg. 35,733 (1991) (Emphasis added).

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[5] Neither Teahan nor Petitioner's premise is referenced in the Guidance.

[6] A provision which elevates previous Rehabilitation Act regulation to statutory status.

The equal treatment criteria of the ADA, and regulations and guidance implementing the statute have now been the subject of judicial interpretation in numerous cases which uniformly recognize that the misconduct/disability distinction is one which is to be uniformly applied, and is not confined to the context of alcoholism or the illegal use of drugs. See, e.g., Palmer v. Circuit Court of Cook County, Ill., 117 F.3d 351, 352 (7th Cir. 1997) ("[I]f an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act."). These cases confirm the equal treatment and consistent implementation goals of the ADA. 42 U.S.C. § 12101(b)(2).

CONCLUSION

There is no explicit conflict between the United States Courts of Appeals under the current state of the law. It is submitted that the express language of the ADA, the considered opinion of the EEOC, and the overwhelming weight of judicial authority dictate the result reached in the courts below. For these and the other reasons expressed above, it is urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDICES

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM OPINION

Sixth Circuit Case Nº. 96-3499
Filed June 6, 1997

Pages 1 thru 3

FILED JUNE 6, 1997
LEONARD GREEN, CLERK

NOT RECOMMENDED FOR PUBLICATION

No. 96-3499
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BONNIE LAMVERMEYER,	)	
	)	
Plaintiff-Appellant	)	
	)	**ON APPEAL** FROM THE
	)	UNITED STATES
	)	DISTRICT COURT
v.	)	FOR THE SOUTHERN
	)	DISTRICT OF OHIO
	)	
DENISON UNIVERSITY,	)	
et al.,	)	**MEMORANDUM**
	)	**OPINION**
Defendants-Appellees	)	

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

BEFORE: NELSON and NORRIS, Circuit Judges; COHN, District Judge.[1]

PER CURIAM. Plaintiff, Bonnie Lamvermeyer, appeals from the order of the district court granting summary judgment to defendants. Plaintiff's lawsuit was predicated upon the Americans With Disabilities Act and the Rehabilitation Act of 1973, as well as state law claims.

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of

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[1] The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

the parties, we are not persuaded that the district court erred in granting summary judgment to defendants.

Because the reasoning which supports judgment for defendants has been articulated by the district court, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court is affirmed upon the reasoning employed by that court in its Memorandum and Order filed on March 31, 1996.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MEMORANDUM AND ORDER

Case Nº. C-2-94-46
Filed March 31, 1996

Pages 4 thru 25

FILED MARCH 31, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BONNIE LAMVERMEYER,	:	
	:	
Plaintiff,	:	
	:	Case C-2-94-46
vs.	:	
	:	
DENISON UNIVERSITY,	:	
ET AL.	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

Plaintiff Dr. Bonnie Lamvermeyer filed this action following her termination as a tenured professor of biology at Denison University. Plaintiff contends that, in terminating her employment, defendants violated state and federal statutes which prohibit employers from discriminating against individuals with disabilities, breached her employment contract, and caused her severe emotional distress. Jurisdiction is based on the presence of a federal question; there is no diversity of citizenship among the parties. This matter is before the Court on defendants' motion for summary judgment.

I. Background

Plaintiff's employment with Denison University began in 1978, when she was hired as an associate professor of biology. (December 1, 1994 Deposition of Dr. Bonnie Lanvermeyer, pp. 7-8). In the spring of 1984, plaintiff was awarded tenure[1] and promoted to the position of associate professor of biology, a position she held until the date of her termination. (Id.)

At some point during the mid-1980s, plaintiff began to experience emotional problems. (Id. at 48). These problems manifested themselves during the summer of 1985, when plaintiff first experienced what she later learned was a panic attack. (Id.) While plaintiff was walking between the library and the biology department her arms and legs began to tingle, she became very cold, she felt dizzy and faint, her heart began to race, and she could not

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[1] Dr. Michele Myers, President of Denison University, explained that tenure "means that the university is committed to provide a continuous contract to the faculty member unless there is cause to terminate that contract; to not renew that contract. (December 2, 1994 Deposition of Dr. Michele Myers, p. 27). Moral delinquency is one such cause. (Id.)

breathe. (Id.) According to plaintiff, she felt as if she were dying. (Id.) Thereafter, plaintiff experienced many additional panic attacks, some of which occurred while she was teaching class. (Id. at 53-56). When this happened, plaintiff did not excuse the class but rather asked the class to read for a moment while she excused herself. ((Id.) Because of her panic attacks, plaintiff did not teach during the fall semester of 1985, taking medical leave instead. (Id. at 57). Plaintiff resumed teaching in February 1986. (Id. at 90).

Soon after her first panic attack in 1985 plaintiff sought medical treatment from Dr. Siam Giray. (Id. at 55). Dr. Giray gave plaintiff samples of medications, which, according to plaintiff, made her physically sick without improving her panic disorder. (Id. at 57-60). As a result, plaintiff stopped seeing Dr. Giray and instead sought treatment from Dr. Brian Glynn, a psychiatrist whom Dr. Janet Hyde, then university provost, had recommended. (Id. at 72). Dr. Glynn treated plaintiff for twenty months, from August 1985 until March 1987, during which time plaintiff took Nardil and Xanax, drugs prescribed by Dr. Glynn to treat the physical manifestations of her panic attacks. (Id. at 73-82).

As of March 1987, plaintiff was no longer having panic attacks and was no longer taking Nardil or Xanax. (Id. at 92). Plaintiff was asymptomatic until sometime around 1990, when her panic attacks resumed. (Id. at 95-97). For approximately the next two years she saw Dr. Eric Kahn (she did not go back to Dr. Glynn because he was preparing to leave the area), a psychiatrist who treated her with psychotherapy and the drugs Xanax, Nardil, and Lithium. (Id. at 113, 114, 115, 119, 123). Dr. Kahn prescribed Lithium even though it traditionally had not been used to treat panic attacks because plaintiff was not responding to Xanax or Nardil. (Id. at 133). The Lithium caused plaintiff to have difficulty thinking--she testified that "[i]t was like I was trying to think through a fog." (Id. 134). She experienced other severe side effects as well, such as loss of speech and her ability to use one side of her body, and, as a result, she stopped using Lithium about one year after she began to use it. (Id. at 133-34). The panic attacks continued while plaintiff was under the care of Dr. Kahn. (Id. at 123). The symptoms were the same as before, but the attacks lasted longer. (Id. at 125). Despite this, plaintiff still carried a full teaching load. (Id. at 136). Plaintiff was able to teach, although she was shaky and weak after each panic attack and had difficulty grading papers and writing letters of recommendation on behalf of students. (Id. at 126, 138).

Sometime after July or August 1992, plaintiff stopped seeing Dr. Kahn. (Id. at 144). In the fall of 1992, plaintiff began treatment with Dr. Steven Gemma, who prescribed progressively smaller doses of Xanax and a new drug, Zoloft. (Id. at 151). Eventually, plaintiff stopped taking Xanax and her panic attacks were brought under control. After seeing Dr. Gemma, plaintiff did not experience any full-blown panic attacks or symptoms of emotional or psychiatric problems. (Id. at 156-57).

During the time plaintiff was experiencing panic attacks, an issue arose concerning certain requests for reimbursement she had submitted. At some point prior to July 31, 1992, Dr. Charles Morris, provost of the university,[2] who knew that plaintiff had been having emotional problems, called plaintiff and asked to meet with her. (Id. at 162; December 2, 1994 Deposition of Dr. Charles Morris, p. 10). Dr. Morris requested the meeting because he had learned from the university's vice-president of finance that plaintiff had sought reimbursement for expenses that she may not have incurred. (December 2,

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[2] Dr. Morris described the provost as the chief academic officer of a college, responsible primarily for the curriculum, the academic program, and personnel policies but also involved in other areas such as strategic planning and student life. (December 2, 1994 Deposition of Dr. Charles Morris, p. 7).

1994 Deposition of Dr. Charles Morris, pp. 12-14). A meeting was held on July 31, 1992, at which time plaintiff and Dr. Morris discussed the matter. (December 1, 1994 Deposition of Dr. Bonnie Lamvermeyer, p. 167). At this meeting plaintiff saw copies of her requests for reimbursements and accompanying supporting documents, and, although she recognized certain items that had been purchased, she could not recall how the documents came to exist. (Id. at 167, 175).

Thereafter, the university began formal proceedings against plaintiff, notifying her in a letter dated December 1, 1992 from Dr. Michele Myers, president of the university, that a hearing would be held on a charge of moral delinquency pursuant to the procedure set forth in the University Faculty Handbook. (December 1, 1992 letter from Dr. Myers, Exhibit B to Defendants' Motion for Summary Judgment). The letter informed plaintiff that the moral delinquency charge related to her submission of "false expense vouchers for which you received University monies." (Id.) The letter also listed the eight requests for payment submitted by plaintiff and explained why, in the opinion of the university, the vouchers supporting the requests were false. (Id.)

A hearing was held on May 6, 1993 before a panel comprised of members of the faculty. (May 7, 1993 letter to Dr. Myers, Exhibit E to Defendants' Motion for Summary Judgment). Plaintiff was represented by counsel at this hearing. The next day, after meeting again, the panel members recommended in a letter to Dr. Myers that plaintiff's employment be terminated. (Id.) The panel members arrived at the following conclusions:

> - We conclude that Professor Lamvermeyer did submit false expense vouchers for which she received University monies.
>
> - We conclude that these submissions constitute acts of moral delinquency.
>
> - We are not persuaded that her disability and/or medication significantly impaired her ability to make moral judgments. Therefore, we conclude that she is morally responsible for these actions.

(Id.)

In a letter dated May 14, 1993, Dr. Myers informed plaintiff: "I concur with the Panel that you are guilty of the

moral delinquency charges brought against you and that your employment should be terminated." (May 14, 1993 letter to plaintiff, Exhibit F to Defendants' Motion for Summary Judgment). Plaintiff refused an opportunity to resign her employment and instead asked to meet with the Board of Trustee's Executive Committee to restate her position. (May 27, 1993 letter from counsel for plaintiff to counsel for defendant, Exhibit G to Defendants' Motion for Summary Judgment). In making this request for plaintiff, counsel for plaintiff stated that plaintiff "strongly believes that she was not responsible for any falsification of receipts[,] and the expert witnesses support her position. (Id.) On June 29, 1993, the Executive Committee affirmed the hearing panel's recommendation to terminate plaintiff. (June 29, 1993 letter to Dr. Myers, Exhibit H to Defendants' Motion for Summary Judgment). Plaintiff asked the Executive Committee to reconsider its June 29, 1993 decision. (October 18, 1993 letter to plaintiff and her counsel, Exhibit I to Defendants' Motion for Summary Judgment). Both plaintiff and special counsel for the university addressed the Executive Committee in regard to plaintiff's request for reconsideration. (Id.) Thereafter, the Executive Committee unanimously concluded that there was not a sufficient reason to reconsider its earlier decision or the recommendations of the panel and Dr. Myers, and plaintiff's request for reconsideration was therefore denied. (Id.)

Dr. Myers and plaintiff's colleagues knew that plaintiff had experienced a number of panic attacks while employed at Denison University. (December 2, 1994 Deposition of Dr. Michele Myers, p.24). Dr. Myers also knew that accommodations had been made to assist plaintiff with her teaching. (Id.). Dr. Myers testified:

> From the time that she was tenured at Denison, there were times when she was unable to perform her teaching duties and faculty members in that department, colleagues of Dr. Lamvermeyer's, were asked at times to assist, cover classes for her; some students were asked to get books from the library for her when she couldn't leave her office because she had a panic attack. And all of these accommodations were made for several years during -- long before we got into this situation.

(Id. at 23-24). When asked why the university did not make any accommodations at the time of plaintiff's termination, Dr. Myers testified that "[t]he termination had nothing to do with the disability

from my point of view. The termination had to do with moral delinquency and behaviors that were unacceptable to the university." (Id. at 25).

On January 18, 1994, plaintiff filed suit against Denison University and the members of its board of trustees. Plaintiff alleges that, in terminating her employment for the reason given, defendants discriminated against her on the basis of her disability or handicap, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 (first claim for relief), the Rehabilitation Act of 1973, 29 U.S.C. § 794 (second claim for relief), and section 4112.99 of the Ohio Revised Code (third claim for relief). Plaintiff also alleges that defendants breached her employment contract (fourth claim for relief) and that defendants intentionally, recklessly, or negligently caused her severe emotional distress (fifth claim for relief). Plaintiff seeks damages and equitable relief, including reinstatement to her former position with backpay.

Plaintiff strongly asserts that she never intended to defraud the university. She contends--and her expert witnesses agree--that the medication she was taking to control her panic disorder caused her to create inaccurate information on the vouchers she

submitted to the university. One of plaintiff's expert witnesses, Dr. Peter Breggin, concluded that plaintiff was intoxicated by the drug Xanax, a condition evidenced by confusion, amnesia, impaired judgment, loss of impulse control, denial, and confabulation. Plaintiff also contends that almost all of the expenses for which she sought reimbursement were actually incurred and that she can demonstrate this. And she argues that other professors had made similar mistakes on their vouchers but that no action was taken against them.

Nevertheless, plaintiff does not deny that she submitted inaccurate expense vouchers. For example, on June 26, 1991, she submitted a request to be reimbursed for expenses incurred during a trip she took to Atlanta to attend a conference. According to the request form, expenses for lodging at "Almost Home," a private tourist home said to be owned by a woman named Beatrice Tuttle, totalled $200. Supporting this request were four receipts, each showing room charges of $50 and each apparently signed by Beatrice Tuttle. Plaintiff was asked about this in her deposition:

Q. Have you ever heard of a private tourist home called Almost Home?

A. No, I tried to find that in library records and I can't find anything like that.

Q. Did you come to find out that no such place exists?

A. That is my conclusion.

Q. This is very detailed information; would you agree? It has a specific name, the specific owner, the specific date, the specific person, the specific customer identification. All that is very specific information; would you agree?

A. That information is there.

Q. I mean it is not ambiguous as to the details on these invoices.

A. That's correct.

Q. Do you deny creating those invoices to submit with your -

A. I cannot confirm or deny. I don't know.

(December 1, 1994 Deposition of Dr. Bonnie Lamvermeyer, pp. 270-71). The seven other requests for payment that

formed the basis for plaintiff's termination contained similar discrepancies, which plaintiff could not explain.[3]

II. Legal Standard Government Defendants' Motions

Motions for summary judgment are governed by Fed. R. Civ. P. 56(c), which provides:

> [Summary judgment]...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

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[3] Plaintiff did testify at her deposition, however, that the signatures on eight documents labelled "Request for Payment" and prepared during the period from June 26, 1991 through June 3, 1992 (the documents at issue in regard to her termination) were hers or appeared to be hers. (December 1, 1994 Deposition of Dr. Bonnie Lamvermeyer, pp. 180, 192, 199, 222, 228, 235, 241, 245; exhibits 1-8).

"[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 247-48 (1986)(emphasis in original); Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984).

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. The purpose of the procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. Lashlee v. Sumner, 570 F.2d 107, 111 (6th Cir. 1978). Therefore, summary judgment will be granted "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is...[and where] no genuine issue remains for trial,...[for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 467 (1962) (quoting Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944)); accord County of Oakland v. City of Berkley, 742 F.2d 289, 297 (6th Cir. 1984).

In making this inquiry, the standard to be applied by the Court mirrors the standard for what was formerly referred to as a directed verdict. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson, 477 U.S. at 250.

> "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." Bill Johnson's Restaurants. Inc. v. NLRB, 461 U.S. 731, 745, n.ll (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson, 477 U.S. at 251-52. Accordingly, although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules, which are designed "to secure the just, speedy and inexpensive determination of every action." Celotex, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence submitted] must be viewed in the light most favorable to the opposing party." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (footnote omitted); accord Adams v. Union Carbide Corp., 737 F.2d 1453, 1455-56 (6th Cir.), cert. denied, 469 U.S. 1062 (1984). Inferences to be drawn from the underlying facts contained in such materials must also be considered in the light most favorable to the party opposing the motion. United States v. Diebold. Inc., 369 U.S. 654, 655 (1962); Watkins v. Northwestern Ohio Tractor Pullers Ass'n, 630 F.2d 1155, 1158 (6th Cir. 1980). Additionally, "unexplained gaps" in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. Adickes, 398 U.S. at 157-60.

If the moving party meets its burden and adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. The

existence of a mere scintilla of evidence in support of the opposing party's position is insufficient; there must be evidence on which the jury could reasonably find for the opposing party. Anderson, 477 U.S. at 252.

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

III. Discussion

To establish a violation of the Rehabilitation Act of 1973, plaintiff must show, among other things, that she was discriminated against solely by reason of her handicap. Maddox v. University of Tennessee, 62 F.3d 843, 846 (6th Cir. 1995).[4] Likewise, because the Americans with

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[4] Plaintiff must also show that she is a handicapped person under the Act, that she is otherwise qualified for the position of

Disabilities Act "parallels the protection of the Rehabilitation Act," Maddox, 62 F.3d at 846 n.2, plaintiff must also show under the Americans with Disabilities Act that she was terminated solely by reason of her disability. For the reasons set forth below, the Court determines that there is no genuine issue of material fact concerning whether plaintiff was terminated solely by reason of her handicap or disability.

It is undisputed that plaintiff was found to have engaged in misconduct which, in the opinion of the university's board of trustees, was sufficiently egregious to warrant her termination. It is also undisputed that the board of trustees terminated plaintiff on the basis of its finding of misconduct. As a result, plaintiff cannot demonstrate that defendants terminated her employment solely by reason of her handicap or disability. Defendants are thus entitled to summary judgment on plaintiff's claims under the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

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associate professor of biology, and that Denison University was receiving federal financial assistance. Maddox, 62 F.3d at 846.

The Court's conclusion on this issue is based on the decisions of the Sixth Circuit in Maddox and Ferby v. United States Postal Service, No. 94-5792, 1995 U.S. App. LEXIS 37079 (6th Cir. Nov. 27, 1995). In Maddox, plaintiff, a former assistant football coach at the University of Tennessee (UT), alleged that he was terminated on the basis of his disability, alcoholism, in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. and the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. While employed at UT, plaintiff was arrested and charged with driving under the influence of alcohol. This incident, which was highly publicized, was embarrassing to UT. As a result, after determining that the allegations against plaintiff were accurate, UT notified plaintiff that his employment was terminated. Plaintiff sued UT, contending that his termination was discriminatory on the basis of his alcoholism. There was no dispute, however, that plaintiff had been terminated because of his misconduct. The district court therefore held that UT did not terminate plaintiff solely by reason of his disability, and granted summary judgment in favor of defendants.

The Sixth Circuit stated that the district court was correct in focusing on the distinction between discharging a person for unacceptable misconduct allegedly caused by

his or her disability and discharging the person because of his or her disability. The court then affirmed the grant of summary judgment in favor of defendants, holding that "[e]mployers subject to the Rehabilitation Act and ADA must be permitted to take appropriate action with respect to an employee on account of egregious or criminal conduct, regardless of whether the employee is disabled." Maddox, 62 F.3d at 848. In so holding, the court expressly rejected the reasoning of the Second Circuit in Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511 (2d Cir. 1991), cert. denied, 113 S.Ct. 54 (1992), a decision relied upon by plaintiff in opposing defendants' motion for summary judgment.

The Sixth Circuit subsequently reaffirmed its position that a distinction must be made between conduct and disability. In Ferby, plaintiff, an alcoholic, was terminated following a violent outburst at work, an outburst which, plaintiff contended, was caused by his alcoholism. Plaintiff sued under the Rehabilitation Act of 1973 after his request for reinstatement was denied. The only question was whether plaintiff was denied reinstatement "solely by reason of his handicap," in violation of the Rehabilitation Act. Answering this question in the negative, the Sixth Circuit held that "[a]n employer does not rely solely on the handicap when it demonstrates that a person is discharged for misconduct, even if the conduct is related to a handicap." Ferby, 1995 U.S. App. LEXIS at *3.

In the present case, there is no dispute that defendants terminated plaintiff for what they determined to be misconduct in connection with certain requests for payment made by her. Under the decisions in Maddox and Ferby, even if plaintiff's conduct was caused by her disability, her termination was not discriminatory under the Americans with Disabilities Act or the Rehabilitation Act of 1973. Defendants, therefore, are entitled to summary judgment on these claims.

IV. Conclusion

The Court GRANTS defendants' motion for summary judgment with respect to plaintiff's claims under the Americans with Disabilities Act and the Rehabilitation Act of 1973, the only claims under federal law presented in this action, and DISMISSES the pendent state-law claims without prejudice. See Gaff v. Federal Deposit Insurance Corp., 814 F.2d 311, 319 (6th Cir. 1987) (as a general rule, when federal issues are dismissed before trial, district courts should decline to exercise pendent jurisdiction over state law claims).

IT IS SO ORDERED.

/s John D. Holschuh
John D. Holschuh, Judge
United States District Court

APPENDIX

EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act, 3/25/97; Question 3

Pages 26 thru 31

EEOC Guidance On Psychiatric Disabilities And the Americans With Disabilities Act

EEOC	NOTICE	Number 915.002 Date 3/25/97

1. *SUBJECT*: EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities.

2. PURPOSE: This enforcement guidance sets forth the Commission's position on the application of Title I of the Americans with Disabilities Act of 1990 to individuals with psychiatric disabilities.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5),

this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: ADA Division, Office of Legal Counsel.

6. INSTRUCTIONS: File after Section 902 of Volume II of the Compliance Manual.

Date 3-25-97

/S/ Gilbert F. Casellas
Chairman

. . .

30. May an employer discipline an individual with a disability for violating a workplace conduct standard if the misconduct resulted from a disability?

Yes, provided that the workplace conduct standard is job-related for the position in question and is consistent with business necessity.[7] For example, nothing in the ADA

[7] 42 U.S.C. § 12112(b)(6) (1994); 29 C.F.R. § 1630.10, .15(c) (1996).

prevents an employer from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who steals or destroys property. Thus, an employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.[8] Other conduct standards, however, may not be job-related for the

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[8] *See* EEOC Compliance Manual § 902.2, n.11, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7259, n.11 (1995) (an employer "does not have to excuse . . . misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees"); *see* 56 Fed. Reg. 35,733 (1991) (referring to revisions to proposed ADA rule that "clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards").

position in question and consistent with business necessity. If they are not, imposing discipline under them could violate the ADA.

Example A: An employee steals money from his employer. Even if he asserts that his misconduct was caused by a disability, the employer may discipline him consistent with its uniform disciplinary policies because the individual violated a conduct standard -- a prohibition against employee theft -- that is job-related for the position in question and consistent with business necessity.

Example B: An employee at a clinic tampers with and incapacitates medical equipment. Even if the employee explains that she did this because of her disability, the employer may discipline her consistent with its uniform disciplinary policies because she violated a conduct standard -- a rule prohibiting intentional damage to equipment -- that

is job-related for the position in question and consistent with business necessity. However, if the employer disciplines her even though it has not disciplined people without disabilities for the same misconduct, the employer would be treating her differently because of disability in violation of the ADA.

Example C: An employee with a psychiatric disability works in a warehouse loading boxes onto pallets for shipment. He has no customer contact with and does not come into regular contact with other employees. Over the course of several weeks, he has come to work appearing increasingly disheveled. His clothes are ill-fitting and often have tears in them. He also has become increasingly anti-social. Coworkers have complained that when they try to engage him in casual conversation, he walks away or gives a curt reply. When he has to talk to a coworker, he is abrupt and rude. His work, however, has not suffered. The

employer's company handbook states that employees should have a neat appearance at all times. The handbook also states that employees should be courteous to each other. When told that he is being disciplined for his appearance and treatment of coworkers, the employee explains that his appearance and demeanor have deteriorated because of his disability which was exacerbated during this time period.

The dress code and coworker courtesy rules are not job-related for the position in question and consistent with business necessity because this employee has no customer contact and does not come into regular contact with other employees. Therefore, rigid application of these rules to this employee would violate the ADA.